SENATE JUDICIARY
EXHIBIT NO. 5
DATE 2/17/11
BILL NO. SB 308

MONTANA DEPARTMENT OF JUSTICE

Legal Background Related to SB 308:

To Criminalize the Refusal to Take a Blood or Breath Test for Alcohol or Drugs

The "right" to refuse testing is "simply a matter of grace bestowed" by state legislatures.

United States Supreme Court in South Dakota v. Neville
459 U.S. 553, 565 (1983)

"Because refusal to take the test is a matter of grace, the Legislature may contour this favor in a manner it deems appropriate."

Montana Supreme Court in State v. Turbiville, 2003 MT 340,
¶ 16, 318 Mont. 451, 81 P.3d 475

Have other states successfully criminalized refusal?

Yes. The United States Congress has criminalized refusal by making it a crime to refuse a blood-alcohol test in the National Parks. Additionally, at least 11 states have made refusals a crime in some manner, including Alaska, Minnesota, Nebraska, Louisiana, Florida, Michigan, Tennessee, Rhode Island, Vermont, Virginia and Hawaii.

Some of these laws have been on the books for over 40 years. For example, Alaska's statute was enacted in 1969, Nebraska's in 1971 and Minnesota's in 1989.

Have the Statutes in other states been upheld as Constitutional?

Yes. Laws criminalizing refusal have repeatedly withstood constitutional challenges.

The most common challenges are based on the Fourth and Fifth Amendments to the United States Constitution and the corresponding state provisions. The manner in which Alaska and Minnesota have addressed these challenges is useful because, like Montana, these states have broader privacy protections than those under the United States Constitution.

The Right against Self-Incrimination

Courts have determined that using a defendant's refusal in a criminal trial does not violate the right against self-incrimination because:

- A refusal is non-testimonial conduct, similar to fingerprints, handwriting, voice identification and blood tests. This type of "real or physical" evidence is not protected by the privilege. State v. Slade, 2008 MT 341, ¶ 32, 346 Mont. 271, 194 P.3d 677.

- It is well-settled that refusals can be used against a DUI defendant without violating the right against self-incrimination. The fact that criminal charges may be imposed for refusal "in no way compels those individuals to refuse." If anything, the possibility of criminal charges encourages individuals not to refuse testing. McDonnell v. Commr. of Pub. Safety, 473 N.W.2d 848, 855-56 (Minn. 1991).

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- There is no constitutional right to refuse testing, and thus, "the refusal cannot be protected by the privilege against self-incrimination." Svedlund v. Municipality of Anchorage, 671 P.2d 378, 381 (Alaska App. 1983).

Unreasonable Search and Seizure/Right to Privacy

Courts have held that criminalizing refusal does not violate the rights to be free from *unreasonable search and seizure* because:

- A refusal cannot be prosecuted unless probable cause exists to arrest for DUI. Police may constitutionally conduct a search following a lawful arrest. Svedlund, 671 P.2d at 384; Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1450 (9th Cir. 1986).

- A breath test would be justified because of "exigent circumstances" due to the temporary nature of blood-alcohol evidence. Minnesota v. Netland, 762 N.W.2d 202, 214 (Minn. 2009).

- A breath test is constitutionally reasonable both as a search incident to a lawful arrest and because of exigent circumstances. United States v. Reid, 929 F.2d 990 (4th Cir. 1991).

On the *right to privacy*: The compelling state interest of protecting residents from drunk drivers weighs heavier than the individual right to privacy. Minnesota v. Mellet, 642 N.W. 2d 779, 784 (Minn. App. 2002). Testing drivers suspected of DUI is an important part of implementing the legislature's compelling state interest.